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12 UNITED STATES DISTRICT COURT  
13  
14 NORTHERN DISTRICT OF CALIFORNIA  
15  
16 SAN FRANCISCO DIVISION

15 HUAWEI TECHNOLOGIES CO., LTD., et al.,  
16  
17 Plaintiffs,  
18 v.  
19 SAMSUNG ELECTRONICS CO., LTD., et al.,  
20 Defendants.

21 SAMSUNG ELECTRONICS CO., LTD. &  
SAMSUNG ELECTRONICS AMERICA, INC.  
22  
23 Counterclaim-Plaintiffs,  
24 v.  
25 HUAWEI TECHNOLOGIES CO., LTD.,  
HUAWEI DEVICE USA, INC., HUAWEI  
26 TECHNOLOGIES USA, INC., & HISILICON  
TECHNOLOGIES CO., LTD.  
27  
28 Counterclaim-Defendants.

CASE NO. 16-cv-02787-WHO

**SAMSUNG'S OPPOSITION TO  
HUAWEI'S MOTION AND FRCP  
59(e) MOTION TO ALTER OR  
AMEND THE COURT'S APRIL 13,  
2018 ORDER GRANTING  
SAMSUNG'S MOTION FOR  
ANTISUIT INJUNCTION, OR, IN  
THE ALTERNATIVE, L.R. 7-9  
MOTION FOR LEAVE TO FILE  
SAME**

**Hearing Date: June 6, 2018  
Time: 2:00 p.m.  
Place: Courtroom 2, 17th Floor  
Judge: Hon. William H. Orrick**

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1 **I. INTRODUCTION**

2 Huawei's motion for reconsideration should be denied because its alleged "manifest factual  
3 error" is, itself, factually incorrect. The facts show definitely that Huawei put its FRAND conduct  
4 at issue when it filed its initial Complaint. Huawei identifies a single allegedly "manifest factual  
5 error": That the court failed to consider that the only "overlap" between this action and the Shenzhen  
6 injunction actions arose after Samsung filed its breach of contract counterclaims (the "counterclaim  
7 timing" argument). But the premise of this alleged "failure to consider" is itself in error. It cannot  
8 be disputed that it was Huawei's own cause of action for breach of contract (Count I) *in its May*  
9 *2016 Complaint* that first put Huawei's FRAND behavior at issue.

10 For Huawei to prevail on its breach of contract claim, Huawei must prove that it satisfied all  
11 conditions precedent. Here, as pleaded, condition precedents of Huawei's breach of contract claim  
12 include proof that Huawei itself was willing to license Samsung to its SEPs on FRAND terms and  
13 conditions and that it negotiated in good faith in an attempt to reach agreement on a FRAND cross  
14 license for those SEPs. ETSI's IPR policy expressly provides that a party's FRAND undertaking  
15 "may be made subject to the condition that those who seek licenses agree to reciprocate." Ex. 1  
16 (ETSI IPR Policy).<sup>1</sup> As a matter of course, Samsung invokes this reciprocity condition in its ETSI  
17 FRAND undertakings—as exemplified in the Samsung IPR declaration that Huawei filed as an  
18 attachment to its Complaint. *See, e.g.*, Dkt. 1 ("Compl.") Ex. 3.11 at 1 ("This undertaking is made  
19 subject to the condition that those who seek licenses agree to reciprocate the same in respect of the  
20 STANDARD in accordance with Clause 6.1 of the ETSI IPR Policy.").

21 Huawei knows this too. That is why Huawei's breach of FRAND claim pleads detailed  
22 allegations that:

- 23 • "Huawei has at all times been willing (and obliged under its own declarations to  
24 ETSI) to reciprocate, i.e., to grant to Defendants a license to Huawei's UMTS and  
25 LTE SEP portfolio on FRAND terms and conditions." Compl. ¶ 56; and

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26  
27 <sup>1</sup> "Ex." Refers to exhibits to the Declaration of Sam Stake in opposition to Huawei's FRCP  
28 59(e) Motion To Alter or Amend the Court's April 13, 2018 Order Granting Samsung's Motion  
for Antisuit Injunction, or, in the alternative, L.R. 7-9 Motion for Leave to File Same.

- 1           • “For its part, Huawei . . . has negotiated in good faith with Samsung and has  
2           attempted to reach agreement on FRAND terms and conditions for a cross-license.  
3           Huawei has made an offer for a cross-license on FRAND terms and conditions. . . .”  
4           Compl. ¶58.

5           A determination that Huawei failed itself to comply with its FRAND obligations will be  
6           dispositive of Huawei's breach of contract cause of action. It will also be dispositive of Huawei's  
7           ability to seek injunctive relief against Samsung on its SEPs in China. Because the alleged “manifest  
8           factual error” that the Court allegedly did not consider—the counterclaim timing argument—is itself  
9           factually incorrect, Huawei's motion should be denied.

10          Huawei's reconsideration motion should also be denied because Huawei could have—but  
11          did not—assert its counterclaim timing argument before the Court issued its Order. The  
12          reconsideration rules under both Rule 59(e) and L.R. 7-9(b)(3) prohibit attempts to inject new  
13          arguments or legal theories that reasonably could have been raised earlier. Not once in its opposition  
14          to the underlying motion or at the hearing regarding the antisuit injunction did Huawei make its new  
15          counterclaim timing argument, or argue that the Court's *Gallo* analysis turned on a three-month gap.  
16          Because Huawei could have but failed to raise this argument, Huawei is now barred from offering  
17          it as a basis for reconsideration.

18          More fundamentally, Huawei's motion should be denied because nothing in it calls into  
19          question the Court's analysis of the three *Gallo* factors, which formed the basis for the Court's  
20          Order. Huawei's counterclaim timing argument does not affect the Court's conclusion that there is  
21          an identity of issues and parties between this action and the Chinese litigations. Dkt. 281 (Order  
22          Granting Samsung's Motion for Antisuit Injunction (“Order”)) at 10-15. Nor does it conflict with  
23          the Court's analysis under the *Unterweser* factors. Regardless of when Samsung filed its  
24          counterclaims, Huawei is improperly using injunctive relief as a “bargaining chip” and the Shenzhen  
25          Orders threaten to compromise the ability of the Court to “reach a just result” and inhibit this Court's  
26          “ability to determine the propriety of injunctive relief.” Order at 17. Likewise, the counterclaim  
27          timing argument is irrelevant to the Court's conclusion that numerous factors minimize the Order's  
28          impact on comity. The timing of the counterclaims is not relevant to the fact that Huawei and

1 Samsung are engaged in a private contractual dispute unlikely to raise international issues, that the  
2 injunction only restrains Huawei, not the Shenzhen Court, and that the scope of the antisuit  
3 injunction is limited because this action will likely proceed to trial in six months. Order at 19-20.

4 As for Huawei's argument that the Court committed a manifest legal error, that too fails.  
5 Huawei made the exact same argument in its briefing, and the Court already considered and rejected  
6 it. Huawei's reconsideration motion simply parrots the legal argument it previously made in its  
7 opposition brief, namely that "Samsung must also establish the other, traditional elements of a  
8 preliminary injunction." Dkt. 240-3 (Huawei's Br. in Opp. to Samsung's Mot. for Antisuit  
9 Injunction ("Antisuit Opp Br.)) at 13. Samsung explained in its reply brief why this is not so,  
10 pointing to the Ninth Circuit's analysis in *Microsoft* confirming that the three-part *Gallo* test is the  
11 exclusive test for assessing the propriety of an antisuit injunction. Dkt. 244-2 (Samsung's Reply  
12 Br. in Supp. of Samsung's Mot. for Antisuit Injunction) at 4. The Court properly reached the same  
13 conclusion. Indeed, at the outset of the hearing on Samsung's motion, the Court indicated that it  
14 was inclined to reject this very argument, stating "[i]t does seem to me that the Gallo test applies,"  
15 and after outlining its application of the three-part test, stated it was "inclined to" grant the Motion.  
16 Dkt. 254 (Transcript of March 14, 2018 Hearing) ("Antisuit Tr.") at 3-4. Nowhere in its argument  
17 at the hearing did counsel for Huawei challenge or even address the Court's tentative rejection of  
18 its argument that Samsung must prove the "traditional" elements of a preliminary injunction.  
19 Having foregone an opportunity to challenge the Court's reasoning at oral argument, Huawei cannot  
20 be heard now to seek reconsideration of that very argument.

21 Because Huawei has failed to meet the demanding standards for reconsideration required by  
22 Rule 59(e) and L.R. 7-9(b)(3), its motion should be rejected.

## 23 **II. APPLICABLE LAW**

24 Huawei cites Federal Rule 59(e) ("Altering or Amending a Judgment") and Local Rule 7-  
25 9(b)(3) ("Motion for Reconsideration") as alternate grounds for relief. Federal Rule 59(e) limits  
26 relief, in pertinent part, to "manifest errors of law or fact upon which the judgment rests." *Allstate*  
27 *Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). The rule offers an "extraordinary remedy,  
28 to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v.*

1 *Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal citations and quotations omitted). Local Rule  
 2 7-9(b)(3) similarly requires a movant seeking leave for reconsideration to demonstrate a “manifest  
 3 failure by the Court to consider material facts or dispositive legal arguments which were presented  
 4 to the Court before such interlocutory order.” Both rules require Huawei to identify factual errors  
 5 that, if corrected, would alter the outcome of the judgment or interlocutory order in question. *See*  
 6 *Allstate Ins. Co.*, 634 F.3d at 1111 (manifest error of fact must be one “upon which the judgment  
 7 rests”); L.R. 7-9(b)(3) (the Court must have failed to consider “material” facts).

8 When presenting purported factual errors, Huawei is barred under both Rule 59(e) and L.R.  
 9 7-9 from presenting new arguments against the antisuit order that it could reasonably have raised  
 10 before. *See Interior Glass Sys., Inc. v. United States*, Case No. 13-cv-5563, 2017 WL 1153012, at  
 11 \*3 (N.D. Cal. Mar. 28, 2017) (“A Rule 59(e) motion may not be used to raise arguments or present  
 12 evidence for the first time when they could reasonably have been raised earlier in the litigation”)  
 13 (citing *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)); *Rishor v.*  
 14 *Ferguson*, 822 F.3d 482, 492 (9th Cir. 2016) (“We have also held that a Rule 59(e) motion may not  
 15 be used to ‘raise arguments or present evidence for the first time when they could reasonably have  
 16 been raised earlier in the litigation’”); *see Lenk v. Monolithic Power Sys., Inc.*, Case No. 16-cv-  
 17 02625, 2018 WL 1000632, at \*1 (N.D. Cal. Feb. 21, 2018) (explaining that “new arguments do not  
 18 justify a reconsideration of issues presented to the Court” under L.R. 7-9); L.R. 7-9(b)(3) (“A  
 19 manifest failure by the Court to consider material facts or dispositive legal arguments *which were*  
 20 *presented to the Court before such interlocutory order*,”) (emphasis added).

21 **III. HUAWEI’S MOTION SHOULD BE DENIED BECAUSE ITS PURPORTED**  
 22 **“FACTUAL ERROR”—THAT ITS FRAND CONDUCT WAS NOT AT ISSUE**  
 23 **UNTIL SAMSUNG FILED ITS COUNTERCLAIMS—IS INCORRECT**

24 It cannot be disputed that it was Huawei’s own cause of action for breach of contract, filed  
 25 on May 24, 2016, that first raised the dispositive issue of Huawei’s FRAND conduct. Compl. ¶¶  
 26 53-60. A condition precedent of Huawei’s breach of contract claim is proof that Huawei itself was  
 27 a willing licensee and did not itself violate FRAND. ETSI’s IP policy expressly provides that a  
 28 party’s FRAND undertaking “may be made subject to the condition that those who seek licences  
 agree to reciprocate” Ex. 1. Samsung invokes this reciprocity condition in its ETSI FRAND



1 undertakings as a matter of course—including in the Samsung IPR declaration that Huawei filed as  
 2 an attachment to its Complaint. *See, e.g.*, Compl. Ex. 3.11 at 1 (“This undertaking is made subject  
 3 to the condition that those who seek licences agree to reciprocate the same in respect of the  
 4 STANDARD in accordance with Clause 6.1 of the ETSI IPR Policy.”); Compl. Ex. 3.12 at 1 (“This  
 5 irrevocable undertaking is made subject to the condition that those who seek licenses agree to  
 6 reciprocate.”); Compl. Ex. 3.13-3.53 at 1 (same). This means that in order for Huawei to prevail on  
 7 its breach of contract claim, Compl. ¶¶ 53-60, Huawei must prove it has been a willing licensor of  
 8 its own patents to Samsung and has complied with its own FRAND obligations including the duty  
 9 to negotiate in good faith.<sup>2</sup> *See, e.g.*, Ex. 2 (Final Jury Instructions, *Apple v. Samsung* 11-CV-01846-  
 10 LHK (N.D. Cal.)). Indeed, in its initial Complaint, Huawei specifically avers that it satisfied this  
 11 condition. In the averments under its Cause of Action I for breach of contract, Huawei devoted  
 12 several full paragraphs to arguing it satisfied its own FRAND obligations. Compl. ¶ 56 (“Huawei  
 13 has at all times been willing (and obliged under its own declarations to ETSI) to **reciprocate**, i.e., to  
 14 grant to Defendants a license to Huawei’s UMTS and LTE SEP portfolio on FRAND terms and  
 15 conditions.”); ¶ 58 (“For its part, Huawei, on behalf of itself and its affiliates, including Huawei  
 16 Device and Huawei Tech. USA, has **negotiated in good faith with Samsung** and attempted to reach  
 17 agreement on FRAND terms and conditions for a **cross-license**.”) (emphasis added). Thus,  
 18 Huawei’s central argument that the Court made a manifest error by failing to consider that the  
 19 “overlap” between this case and Shenzhen injunction actions only occurred upon the filing of  
 20 Samsung’s counterclaims is fully without merit. Huawei’s own conduct has been at issue since May  
 21 24, 2016, when it filed its initial Complaint.

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22  
 23  
 24 <sup>2</sup> Both parties agree that French law governs the breach of contract claims. Compl. ¶ 30; Dkt.  
 25 91 (Samsung’s Answer and A. Countercls) ¶¶ 537-546 (citing the ETSI IPR Policy). Huawei’s  
 26 demonstration of its own compliance with FRAND principles as part of its breach of contract  
 27 claim is at least analogous to the requirement to satisfy all conditions precedent under United  
 28 States contract law. *See, e.g., MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 939 (9th Cir.  
 At 2010) (“A condition precedent is an act or event that must occur before a duty to perform a  
 promise arises.”) (citing *AES P.R., L.P. v. Alstom Power, Inc.*, 429 F.Supp.2d 713, 717 (D. Del.  
 2006) and Restatement [Second] of Contracts § 224 (non-occurrence of condition)).



1 Huawei points to no factual error in the Court's Order. The only portion of the Order Huawei  
 2 cites in support of its claim of "manifest factual error" is the following:

3 The appropriate remedy for *Huawei's breach of contract claim* may very well be the  
 4 injunctive relief issued by the Shenzhen court. But I must have the opportunity to  
 5 adjudicate that claim without Samsung facing the threat of the Shenzhen court  
 6 injunctions.

7 Mot. at 3 (citing Order at 15) (emphasis in Huawei's motion). First, these two sentences cannot  
 8 constitute "manifest factual error" because they are not factual findings. Rather, the first  
 9 constitutes speculation by the Court as to what "[t]he appropriate remedy" "may very well be,"  
 10 and the second constitutes an expression of the Court's desire, or need, to "adjudicate" Huawei's  
 11 claims "without Samsung facing the threat of the Shenzhen court injunctions." Order at 15.

12 Second, these two sentences are not taken from the Court's analysis of whether this case  
 13 would be dispositive of the Shenzhen injunction request, but rather from a paragraph in which the  
 14 Court addresses equitable estoppel. The Court correctly rested its identity of issues/dispositive  
 15 findings on its observations, earlier in the Order, that *each party* asserts a "breach of contract claim  
 16 based on the other's alleged failure to abide by its commitments to ETSI," that "the availability of  
 17 injunctive relief for *each party's* SEPs depends on the breach of contract claims," and that, as in  
 18 *Microsoft*, "[t]he contractual umbrella over the patent claims controls." Order at 13 (emphasis  
 19 added). Rather than addressing the identity of issues factor, the passage quoted by Huawei relates  
 20 to the Court's conclusion—repeated throughout its Order—that the Shenzhen orders threaten to  
 21 deprive the Court of the "opportunity to adjudicate" this suit *at all*. Order at 1 ("[The injunction]  
 22 orders could render meaningless the proceedings here."), 17 ("The Chinese injunctions would likely  
 23 force it to accept Huawei's licensing terms, before any court has an opportunity to adjudicate the  
 24 parties' breach of contract claims.").

25 Third, the Court's statements are correct for the same reason that Huawei's counterclaim  
 26 timing argument is not well taken. Again, Huawei's breach of contract claim will requires a finding  
 27 that Huawei itself complied with FRAND as a condition precedent. Without that finding, injunctive  
 28 relief is not an available remedy under its worldwide ETSI undertakings. On the flip side, should

1 Huawei establish it did satisfy its FRAND obligations, then, as the Court notes, injunctive relief in  
 2 Shenzhen may be an appropriate remedy.<sup>3</sup>

3 **IV. HUAWEI'S MOTION SHOULD BE DENIED BECAUSE HUAWEI COULD**  
 4 **HAVE, BUT FAILED TO, RAISE ITS NEW COUNTERCLAIM TIMING**  
 5 **ARGUMENT PRIOR TO THE COURT'S ORDER GRANTING INJUNCTIVE**  
 6 **RELIEF**

7 Huawei's counterclaim timing argument should also be rejected because Huawei improperly  
 8 waited until now to raise it for the first time. In determining Rule 59(e) motions and motions for  
 9 leave pursuant to Civ. L. R. 7-9(b), courts consistently reject parties' attempts to inject new  
 10 arguments or legal theories that they reasonably could have raised earlier. *See, e.g., Kona Enters.*,  
 11 229 F.3d at 890; *Caroll*, 342 F.3d 934 at 945; *Lenk*, 2018 WL 1000632, at \*1; *Interior Glass Sys.,*  
 12 *Inc.*, 2017 WL 1153012, at \*3 (N.D. Cal. Mar. 28, 2017); *Garcia v. City of Napa*, Case No. 13-cv-  
 13 3886, 2014 WL 342085, at \*1 (N.D. Cal. Jan. 28, 2014). Huawei made *no attempt* either in its  
 14 opposition to Samsung's antisuit motion or at the hearing on the motion to argue that the timing of  
 15 Samsung's counterclaims warranted denying the motion. Antisuit Opp Br., *passim*; Antisuit Tr.,  
 16 *passim*. Nor does Huawei in its current reconsideration motion identify any reasonable excuse for  
 17 omitting this argument from its brief or at the hearing. Mot., *passim*.<sup>4</sup> Accordingly, the Court should  
 18 thus deny Huawei's request that the Court reconsider Huawei's newly presented factual arguments.

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19 <sup>3</sup> Huawei's suggestion that it would limit its rate setting cause of action to the US is a red  
 20 herring. For one, the Court's analysis of the *Gallo* factors concerned the parties' breach of  
 21 contract claims—not Huawei's separate rate setting claim. The Court addressed issues concerning  
 22 the rate setting claim in the context of considering estoppel. Order at 13-15. Huawei has not  
 23 sought to alter the scope or description of its breach of contract claim and admitted in its latest  
 24 correspondence that the breach of FRAND claims still turn on whether Samsung failed "to offer or  
 25 grant a license *worldwide* on FRAND terms and conditions." Dkt. 285-3 (Ex. B - Letter from  
 26 David Giardina to Thomas Pease) (emphasis added). Although Huawei did purport to inform  
 Samsung by letter, sent just days before expert reports were due, that it had unilaterally decided to  
 treat the worldwide rate setting claim that had been in the case for nearly two years as a US rate  
 setting claim, Samsung has questioned that decision and is evaluating its options. Mot. at 4 (citing  
 Giardina Letter); *see also* Ex. 3 (April 17, 2018 correspondence from Thomas Pease to David  
 Giardina).

27 <sup>4</sup> Samsung objects should Huawei provide a purported explanation for the first time in its  
 28 reply papers. Because the law clearly requires a party seeking reconsideration to explain why new  
 arguments could not have reasonably been made earlier, it was incumbent upon Huawei to provide

**V. HUAWEI’S MOTION SHOULD BE DENIED BECAUSE THE TIMING OF SAMSUNG’S COUNTERCLAIMS IS IMMATERIAL TO THE COURT’S GALLO ANALYSIS**

Even if Huawei had timely identified a factual error by the Court, the timing of Samsung’s counterclaims is not one “upon which the judgment rests,” and thus Huawei’s motion should be denied. *See, e.g., Thompson v. JPMorgan Chase Bank, N.A.*, Case No. 16-cv-06134, 2017 WL 3059390, at \*2 (N.D. Cal. July 19, 2017) (rejecting Motion for Reconsideration when the movant did not show how cited evidence would alter “any aspect of the Court’s order”). As set forth below, the Court’s three-part *Gallo* analysis stands *irrespective* of the timing of Samsung’s counterclaims.

**A. Huawei Fails To Identify Any Impact On the Court’s “Identity of Issues” Analysis**

The timing of Samsung’s counterclaims is irrelevant to the issue of whether the “parties and the issues are the same.” Order at 9. Both sides agreed the parties are the same. Order at 10. The Court further observed in its Order the issues are the same because “[b]oth parties have presented me with a breach of contract claim based on the other’s alleged failure to abide by its commitments to ETSI,” and “the availability of injunctive relief for each party’s SEPs depends on the breach of contract claims.” Order at 13. As in *Microsoft*—binding Ninth Circuit precedent—the Court concluded the parties’ global breach of FRAND claims created a “contractual umbrella” over all patent claims, including the Chinese patents at issues in the injunction orders. Order at 13. None of these rationales—which are the basis for the Court’s conclusion that there is an identity of issues—turn on the timing of Samsung’s counterclaims.

**B. Huawei Fails To Identify Any Impact On the Court’s *Unterweser* Analysis**

The alleged “manifest factual error” in timing raised by Huawei is also immaterial to the Order’s *Unterweser* analysis. As recognized by the Ninth Circuit, an antisuit injunction order is appropriate when at least one of the *Unterweser* factors applies. *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). Huawei cannot demonstrate that the timing of Samsung’s

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any such explanation in its opening papers. Having failed to do so, Huawei should not be permitted proffer an excuse for the first time on reply.

1 counterclaims upsets the Court’s analysis of *any* (let alone all) of the *Unterweser* factors found to  
2 support the antisuit injunction.

3       The Court’s *Unterweser* analysis concluded that “domestic policy” and “other equitable  
4 considerations” supports the antisuit injunction. Order at 16. The Order noted that the “bulk of  
5 precedent” supported Samsung’s policy concerns about patent hold-up and the threat that Huawei  
6 would use its SEPs as a “bargaining chip.” Order at 16-17. The Order further explained that the  
7 Shenzhen injunction orders threaten “the court’s ability to reach a just result in the case before it  
8 free of external pressure on [Samsung] to enter into a holdup settlement before the litigation is  
9 complete.” Order at 17. Thus, according to the Court, an antisuit injunction preserves the “integrity  
10 of this action,” Order at 17, and ensures the Shenzhen order will not “render meaningless the  
11 proceedings here.” Order at 1.

12       These policy goals and equitable considerations forcefully apply regardless of when  
13 Samsung filed its counterclaims. Regardless of when Samsung filed its counterclaims, Huawei is  
14 improperly using injunctive relief as a “bargaining chip,” and the Shenzhen Orders threaten to  
15 compromise the ability of the Court to “reach a just result” and inhibit this Court’s “ability to  
16 determine the propriety of injunctive relief.” Order at 17-18. Huawei has therefore failed to  
17 identify any factual error warranting reconsideration of the *Unterweser* factors.

18       Huawei’s only legal support for the proposition that Huawei’s novel timing argument may  
19 be relevant to the Court’s *Unterweser* analysis is dicta from *Laker Airways*—a 1984 out-of-circuit  
20 case where the court *granted* an antisuit injunction. That case does not support the proposition that  
21 U.S. courts should defer to earlier filed foreign actions, as argued by Huawei. Mot. at 5. It instead  
22 states that parallel proceedings “should ordinarily be allowed to proceed simultaneously, at least  
23 until a judgment is reached in one which can be pled as res judicata in the other.” *Laker Airways*  
24 *Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984). Huawei is therefore  
25 mistaken that the timing of Samsung’s counterclaims disturbs the Court’s analysis of the *Unterweser*  
26 factors.

1           **C.       Huawei Fails To Identify Any Impact On the Court’s Comity Analysis**

2           Huawei ignores the Court’s detailed analysis of numerous factors independent of timing that  
 3 support its conclusion that the impact on comity is tolerable. First, the Order explained that “comity  
 4 is less likely to be threatened in the context of a private contractual dispute than in a dispute  
 5 implicating public international law or government litigants.” Order at 19-20 (citing *Microsoft*).  
 6 Moreover, the injunction is only against Huawei, not the Shenzhen Court. The Shenzhen action  
 7 may continue to proceed in parallel, and Huawei may still litigate its damages claims in Shenzhen.  
 8 *Id.* The injunction also has a limited temporal scope, lasting less than six months, Order at 20, and  
 9 the antisuit injunction is limited to two patents and a specific form of relief. *Id.* Ultimately, the  
 10 impact on comity is “negligible” here. *Id.* Huawei’s counterclaim timing argument is irrelevant to  
 11 all of these factors.

12           While Huawei correctly identifies that the order in which the domestic and foreign suits were  
 13 filed may be “relevant” to the comity inquiry—see *Microsoft* 696 F.3d at 887—Huawei fails to  
 14 explain *why* the order of suits is sometimes relevant. Specifically, the timing of filing is relevant to  
 15 the comity analysis when a defendant files a later action *in a foreign court*. If the *foreign action*  
 16 were filed later than the domestic action that might indicate the defendant is “attempting to evade  
 17 the rightful authority *of the district court*.” *Id.* at 887 (citing *Applied Med. Distribution Corp. v.*  
 18 *Surgical Co. BV*, 587 F.3d 909, 921 (9th Cir. 2009). In such circumstances the impact of an  
 19 injunction on comity is lessened. *Id.*

20           Huawei’s citation to this order-of-suits consideration is misplaced. Huawei declares without  
 21 analysis that, because Samsung’s counterclaims were filed after the Chinese actions, “the impact on  
 22 comity is especially grave” and that this “weighs heavily against an anti-suit injunction.” Mot. at 5.  
 23 But Huawei completely ignores the fact that Huawei itself filed the present lawsuit here in this  
 24 Court. Indeed, Huawei asked *this Court* to decide a worldwide breach of contract claim and to ban  
 25 Samsung from seeking SEP injunctions anywhere in the world. Compl. ¶¶ 53-60, Prayer for Relief, E.  
 26 Although Samsung has filed later, defensive actions in China, Huawei does *not* allege these foreign  
 27 actions impact comity. Rather, according to Huawei, the later-filed action impacting comity is the  
 28 counterclaims Samsung chose to file *in this very Court*. By filing its counterclaim here, rather than

1 in a foreign court, Samsung is doing the *opposite* of evading the rightful authority of this court.  
 2 Huawei provides no authority whatsoever for its apparent contention that a defendant’s decision to  
 3 file claims *in the same district court and before the same judge where Huawei chose to file its*  
 4 *Complaint* could possibly have any bearing on the Court’s comity analysis.

5 In any event, as stated *supra* at III, Huawei itself put the dispositive issue of the FRAND  
 6 “contractual umbrella” before this Court when it filed its initial Complaint. Order at 10-15. By  
 7 doing so, it was Huawei—not Samsung—who first placed its FRAND conduct before the Court.  
 8 Thus, it is Huawei’s initial breach of contract claim—and its necessary requirement that Huawei  
 9 prove compliance with FRAND—that is dispositive the Shenzhen injunction issue. Samsung’s  
 10 election to later file its own breach of contract claim on the same issues before the same US district  
 11 court in no way impacts comity.

12 **VI. HUAWEI’S PURPORTED LEGAL ERROR AMOUNTS TO NOTHING MORE**  
 13 **THAN REPETITION OF ARGUMENTS EXPRESSLY ARGUED AND REJECTED**  
**BY THE COURT**

14 Huawei argues that the Order rests on a “manifest legal error” because the Order did not  
 15 analyze the traditional *Winter* factors for obtaining a preliminary injunction. Mot. at 6-7. Huawei  
 16 made precisely this argument in its opposition brief, where it argued a party seeking an antisuit  
 17 injunction must meet the four traditional factors for preliminary injunctive relief under *Winter*. See  
 18 Antisuit Opp Br. at 12 (“An anti-suit injunction is a form of preliminary injunction.”). The Court  
 19 already considered and rejected this argument and held that Ninth Circuit law provides the three-  
 20 part *Gallo* test is sufficient to resolve antisuit motions. Order at 6-7. Motions for Reconsideration  
 21 should not be used to rehash prior arguments. L.R. 7-9(c) (“Prohibition Against Repetition of  
 22 Argument” stating that any party who violates this rule “shall be subject to appropriate sanctions”).

23 Moreover, Huawei had an opportunity to challenge the Court’s application of the *Gallo* test  
 24 at the hearing and chose not to do so. At the outset of the hearing, the Court stated “[i]t does seem  
 25 to me that the Gallo test applies,” and, after outlining its application of the three-part test, stated it  
 26 was “inclined to” grant the Motion. Antitrust Tr. At 3-4. Nowhere in its argument at the hearing  
 27 did counsel for Huawei challenge or even address the Court’s tentative conclusion that the three-  
 28 part *Gallo* test applies and that it need not address additional *Winter* preliminary injunction factors.

1 Antisuit Tr., *passim*. Having foregone an opportunity to challenge the Court’s reasoning at oral  
2 argument, Huawei cannot be heard now to argue there was a “manifest legal error.” Mot. at 6.

3 In any event, the Court correctly concluded the *Gallo* factors are sufficient. In particular, as  
4 explained by the Court, the Ninth Circuit applies the three-part *Gallo* test to reviews of orders on  
5 antisuit injunctions, including in the *Microsoft* decision affirming the Western District of  
6 Washington’s antisuit injunction. Order at 7-8. Moreover, at least the Third Circuit has also  
7 “explicitly replaced” the *Winter* factors with the three-part *Gallo* test for antisuit injunction. Order  
8 at 7; *see Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 128–  
9 29 (3d Cir. 2002). The Supreme Court has never called into question the adequacy of the *Gallo* test.  
10 Huawei is thus mistaken that the Court has committed legal error.

## 11 **VII. CONCLUSION**

12 For the foregoing reasons, Huawei’s motion to alter or amend the Order, or in the alternative  
13 for leave to seek reconsideration, should be denied.



1 DATED: May 3, 2018

Respectfully submitted,

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10 **ATTESTATION**

11 I, Victoria F. Maroulis, am the ECF user whose ID and password are being used to file the  
12 above Opposition. In compliance with Civil L.R. 5-1(i)(3), I hereby attest that Thomas D. Pease  
13 has concurred in the aforementioned filing.

14  
15 /s/ Victoria F. Maroulis

16 Victoria F. Maroulis